87-1912

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID JOE WARD,

Petitioner,

v e r s u s

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUANE MILLER
508 W. Vandament, Suite 300
P.O. Box 850187
Yukon, Oklahoma 73085
(405) 354-2526

Counsel of Record for Petitioner

QUESTIONS PRESENTED

1. Whether a person illegally transporting in interstate commerce a stolen vehicle may be convicted and concurrently sentenced under 18 U.S.C. § 2312, for transporting that vehicle in interstate commerce, and under 18 U.S.C. § 2313 for possessing the same vehicle.

2. Whether allowing the Government to present evidence of alleged crimes committed by the accused which were unrelated to the offenses charged, deprived the accused of a fair trial.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

PAGE

Statutes

Rules

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID JOE WARD,
Petitioner,

v e r s u s

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, David Joe Ward, prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit rendered in these proceedings on the 7th day of March, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. A-1 through A-19. The opinion of the District Court of Oklahoma appears at Appendix A, pp. A-20 through A-24.

JURISDICTION

The order or judgment of the Court of Appeals for the Tenth Circuit was entered on the 7th day of March, 1988. This Petition for Certiorari was filed less than 60 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

RULE 403, FEDERAL RULES OF EVIDENCE:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATUTES INVOLVED

TITLE 18 U.S.C. § 2312:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

TITLE 18 U.S.C. § 2313:

> "Whoever receive, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a state or United States boundary after being stolen, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

1. Nature of the Case

The Petitioner was initially tried by a jury, in the United States District Court for the Eastern District of Oklahoma. The jury was unable to reach a decision and the jury was discharged.

The petitioner, DAVID JOE WARD, was again tried by a jury, in the United States District Court for the Eastern District of Oklahoma, and was found guilty of 1 count of conspiracy to transport in interstate commerce stolen motor vehicles, possession of stolen motor vehicles, altering motor vehicle identification numbers and mail fraud, violation of Title 18 U.S.C. § 2312, § 2313, § 511 and § 1343. He was

also convicted of 3 counts of mail fraud, violations of Title 18 U.S.C. § 1341 and § 2, 3 counts of altering motor vehicles identification numbers, violations of Title 18 U.S.C. § 511 and § 2, 3 counts of transporting in interstate commerce a stolen motor vehicle, violation of Title 18 U.S.C. § 2312 and § 2, 3 counts of possession of stolen motor vehicles, violations of Title 18 U.S.C. § 2313 and § 2.

Petitioner was found not guilty on one count of each of the above substantive charges.

Petitioner was sentenced to 5 years imprisonment on the conspiracy charge, to 3 years imprisonment on the first mail fraud charge, sentence to run consecutive to the 5 year sentence and 5 years imprisonment on each of the

remaining counts, with the sentence to run concurrently with the first 5 year sentence. Petitioner was further ordered to make restitution in the amount of $300 and to pay a special assessment on each count, for a total of $650.

2. Statement of the Facts

During Petitioner's entire adult life, he has been employed as a rebuilder of wrecked automobiles (R. p. 630). His business consists primarily of buying salvaged automobiles from insurance loss pools, rebuilding them and then selling them (R. p. 633). The parts used to rebuild the vehicles are purchased from various salvage yards (R. p. 633). These parts are all used automobile parts and the vast majority

have no identification marks on them. There is no means for a purchaser of these parts to know if the parts came from a stolen vehicle (R. p. 261).

Petitioner was charged and convicted of transporting in interstate commerce a stolen Chevrolet Camero (Count IV) and being in possession of the same Chevrolet Camero (Count V); transporting in interstate commerce a stolen Pontiac Firebird (Count VIII) and being in possession of the same Pontiac Firebird (Count IX); transporting in interstate commerce a stolen Cadillac Eldorado (Count XII) and being in possession of the same Cadillac Eldorado (Count XIII).

The Petitioner bought each of these three vehicles from an auto salvage pool and rebuilt the vehicles

from parts he acquired from various salvage yards and then resold the vehicles to a car dealer (R. pp. 643-678). Each of these vehicles contained, when rebuilt, parts which were identified as coming from stolen vehicles.

At trial, during the governments case-in-chief, and in response to a question by the U.S. Attorney, a government witness testified that Petitioner was paying the local Sheriff off (R. p. 170). This testimony was not related or connected in any manner to the offenses charged.

ARGUMENT

1. WHETHER A PERSON ILLEGALLY TRANSPORTING IN INTERSTATE COMMERCE A STOLEN VEHICLE MAY BE CONVICTED AND CONCURRENTLY SENTENCED UNDER 18 U.S.C. § 2312, FOR TRANSPORTING THAT VEHICLE IN INTERSTATE COMMERCE, AND UNDER 18 U.S.C. § 2313 FOR POSSESSING THE SAME VEHICLE.

To determine whether Congress intended the same conduct to be punishable under two criminal provisions, appropriate inquiry is whether each provision requires proof of a fact which the other does not. Ball v. U.S., 470 U.S. 856, 105 S.Ct. 1668 (1985); Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180 (1932).

The assumption being that Congress ordinarily does not intend to punish the same offense under two different statutes.

In Ball, the defendant was convicted of illegally possession a firearm and convicted of a separate offense of receiving the same firearm. Here the Court found that proof of illegal receipt of a firearm necessarily includes proof of illegal possession of that weapon. When received a firearm is necessarily possessed.

A defendant could not be lawfully convicted, under the Bank Robbery Act, for feloniously receiving money taken from a bank and for feloniously taking the same money. Heflin v. U.S., 358 U.S. 415, 79 S.Ct. 451 (1959).

Proof of taking the bank's money necessarily includes proof of receiving the same money. When taken the money is necessarily received.

The Petitioner is charged with transporting in interstate commerce three stolen vehicles and illegally possessing the same three vehicles.

Proof of transporting the vehicles necessarily includes proof of possession of the same vehicles. When transported the vehicle is necessarily possessed.

This Court has had the identical question presented in Woody v. U.S., 258 F.2d 535 (6th Cir. 1957), which was affirmed by an equally divided Court, 359 U.S. 118 (1959). The Court here held that 18 U.S.C. § 2312 and 18 U.S.C. § 2313 are offenses that can be

charged on the same vehicle. The Supreme Court's rules provide that in an evenly split decision by the Supreme Court the lower Court's decision is automatically affirmed. But in view of this Court's decision in Ball, supra, and in other cases decided by this Court since Woody, supra, it is respectfully suggested that this Court will now find that Congress did not intend for a person in Petitioner's position to be convicted of both transporting a stolen vehicle in violation of 18 U.S.C. § 2312 and possessing that same vehicle in violation of 18 U.S.C. § 2313.

2. WHETHER ALLOWING THE GOVERNMENT TO PRESENT EVIDENCE OF ALLEGED CRIMES COMMITTED BY THE ACCUSED WHICH WERE UNRELATED TO THE OFFENSES CHARGED, DEPRIVED THE ACCUSED OF A FAIR TRIAL.

In order for evidence to be admissible at trial, it must be relevant, and its probative value must substantially outweigh any prejudicial effect it may have. Neither of these requirements were met by the Government's case-in-chief when the U.S. Attorney asked the following questions of its witness:

> Q. "Did you ever discuss with David Ward the business of Jerry Grist?" (R. p. 170)

The witness responded:

> A. "We talked a little about it. When I first started dealing with David I didn't know that

he really had a lot to do with Grist." (R. p. 170)

Then the prosecutor asked:

Q. "How did you find out to the contrary?"

The witness responded:

A. "Well, through dealing with all three of the men, I found out that they were paying the Sheriff off, and . . . ." (R. p. 170).

It is important to note first that even if this testimony were true, and the Petitioner contends it is not, there is nothing in the record to show any connection or involvement between this testimony and the offenses charged. The Petitioner was not charged with any offenses related to bribery or attempts to wrongfully influence public officials. Nor was Jerry Grist or his business connected

with this case in any manner. Mr. Grist was not a charged defendant, nor an unindicted co-conspirator, nor a witness. This line of questioning was not intended to prove any connection between the Petitioner and Mr. Grist related to the offenses charged. Its sole purpose was to elicit improper testimony from the witness which would convince the jury that this Petitioner, in addition to the matters charged, was also guilty of corrupting public officials.

Certainly this evidence was not relevant, since the Government did not urge its relevancy at trial, nor does the transcript show it to be relevant.

Not only was the testimony irrelevant, but after the Petitioner's objection, the trial court accused the

prosecutor of knowing that the witness would testify as he did (R. p. 171). The prosecutor acknowledged that prior to the trial the witness told the prosecutor of his allegations of bribery to which he later testified (R. p. 171).

In a criminal prosecution, inquiry into a collateral crime which is unconnected with the offense charged is prohibited. Johnson v. U.S., 318 U.S. 189, 63 S.Ct. 549 (1943).

Even "bad acts" evidence that is admittedly probative may nevertheless be excluded if the danger of undue prejudice outweighs the probative value of the evidence. U.S. v. Fox, 636 F.2d 517 (C.A.D.C. 1980).

In prosecution for illegally importing intoxicating liquor into

Oklahoma from Missouri, testimony of a government agent that he had arrested defendant several months earlier for illegal transportation of liquor and that resulting indictment was then pending in another court, was not admissible to prove guilt. Brinegar v. U.S., 338 U.S. 160, 69 S.Ct. 1302 (1949).

In this case, the statement by the government witness that Petitioner was "paying off the Sheriff" had no probative value, however the prejudicial effect resulting from the jury hearing testimony of alleged bribery by the Petitioner is immeasurable, particularly in the State of Oklahoma, where the public and certainly the average juror is aware of and sensitive to corruption of public

officials when in the State of Oklahoma for the 2 or 3 years prior to this trial no event garnered more publicity than the U.S. Government's prosecution of scores of County Commissioners on charges of public corruption.

The Trial Court here admonished the jury to disregard this testimony by saying:

> "Ladies and Gentlemen, this last answer that the witness gave, I admonish you not to consider that in making a decision in this case. This defendant certainly isn't charged with anything like what this witness said, and there's no reason he should have to defend against that. Just because this witness made a statement like that here in the middle of the trial doesn't mean that he has to defend against that. Just don't consider his answer. It was uncalled for, wasn't asked for by counsel, something he has volunteered, may or may not be true, but it wouldn't make any difference. So just don't consider it in deciding

> the case. It's just absolutely irrelevant, and you shouldn't consider it."

And it is particularly bothering that the Court advised the jury that the statement "may or may not be true, but it wouldn't made any difference".

The witness who spoke this statement, spoke it as the truth, and if the jurors believed it to be true, Petitioner could not receive a fair trial.

A jury will normally be presumed to follow instructions to the jury and disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability the jury would be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be devastating to the

defendant. Green v. Miller, 107 S.Ct. 3102 (1987); Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620 (1968).

There are some contexts in which risk that jury will not, or cannot, follow instructions is so great and consequences of failure so vital to defendant in criminal cause that practical and human limitations of jury system cannot be ignored. Bruton, supra.

A timely instruction from the Judge usually cures prejudicial impact of evidence unless it is highly prejudicial or the instruction is clearly inadequate. U.S. v. Berry, 627 F.2d 193, cert. denied, 449 U.S. 1113, 101 S.Ct. 925 (1980).

Further, the Trial Court acknowledged the seriousness of the

effect of this testimony upon this jury, when the Court made the following remarks at sentencing:

> "And the court also finds that the error made by the Government in this case when its witness gave some unsolicited testimony concerning -- alleging that the defendant was paying off the Sheriff, was aggrievous error that I determined at the time was cured by the admonition to the jury. I have given it considerable thought, and I still believe that it was cured.
>
> However, it was such a serious error, that I believe was cured, but it was so serious, that the court of appeals might very well in this case find that the court had not cured it. I don't think that they will overturn this case. But, it's so close, that I think this case is different than any case I have had up to this time. And I believe that any -- that it does raise a substantial question of law and fact, and it is likely that it would result in a reversal or an order for a new trial.
>
> And, therefore, it's my opinion that the appeal is not for purposes of delay, and I think it would be -- a defense lawyer would

> be grossly in error if he didn't appeal this case, and let more than just one person, more than one just [sic] trial judge sit down and review this case and look it over and reflect seriously about it, and whether or not they think it was reversible error."

(Transcript of Sentencing pp. 19, 20)

In gauging the prejudicial effect of the admission of improper evidence or testimony, the Court must focus upon its probable impact upon the minds of an average jury. Chase v. Crisp, 523 F.2d 595, cert. denied, 96 S.Ct. 1418 (1975).

The Court's judgment must be based upon our own reading of the record and on what seems to us to have been the probable impact . . . (of the inadmissible evidence) on the minds of an average juror. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726

(1969); Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056 (1972).

Again, the trial judge who is a resident of the State of Oklahoma and certainly aware of the publicity given the prosecution of public officials for corruption in office and aware of the attitude the public in general and the average Oklahoma jury has toward such conduct described this testimony as "aggrievous error", "serious error" "it is likely that it would result in a reversal or an order for a new trial", "a defense lawyer would be grossly in error if he didn't appeal" (Transcript of Sentencing pp. 19-20).

There must be no reasonable doubt that the jury would reach the same verdict without hearing the inadmissible testimony. Milton v.

Wainwright, 407 U.S. 371, 92 S.Ct. 2174 (1972).

The minds of the average jury would have found the Government's case significantly less persuasive had the testimony been excluded.

Rule 403 of the FEDERAL RULES OF EVIDENCE provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Under Rule 403, the evidence should never have been heard by the jury, even if the evidence had been relevant and here the evidence was totally irrelevant.

Where evidence has no proven connection with the charges in a case

and is so inflammatory and so prejudicial that no amount of caution or instruction can eradicate the impression of the testimony from the jurors' minds, it is reversible error to allow such evidence to go to the jury.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a Writ of Certiorari issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

DUANE MILLER, OBA #6197
508 W. Vandament, Suite 300
P.O. Box 850187
Yukon, Oklahoma 73085
(405) 354-2526

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned below, have made Service of this Petition by placing three (3) copies of the same in the U.S. Mail, first class postage fully prepaid, and addressed to the following:

Roger Hilfinger
United States Attorney
Federal Court House
Muskogee, Oklahoma 74401

The Solicitor General
Department of Justice
Washington, D.C. 20530

this 5th day of May, 1988.

All parties required to be served have been served.

Duane Miller
DUANE MILLER

CERTIFICATE OF SERVICE

I, the undersigned below, have made Service of this CORRECTED Petition by placing three (3) copies of the same in the U.S. Mail, first class postage fully prepaid, and addressed to the following:

Roger Hilfinger
United States Attorney
Federal Court House
Muskogee, Oklahoma 74401

The Solicitor General
Department of Justice
Washington, D.C. 20530

this 19th day of May, 1988.

All parties required to be served have been served.

Duane Miller

DUANE MILLER

APPENDIX A

FILED
United States Court
of Appeals
Tenth Circuit
MAR 07, 1988
ROBERT L. HOECKER
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID JOE WARD,

Defendant-Appellant.

Case No. 86-2878
(D.C. No. 86-79-CR
District of
Oklahoma, Eastern
District)

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, BARRETT, Circuit Judge, and CONWAY, District Judge.

---

*The Honorable John E. Conway, United States District Judge of the District of New Mexico, sitting by designation.

Appellant David Ward was convicted by a jury of three counts of mail fraud, three counts of altering vehicle identification numbers on automobiles, three counts of transporting an automobile in interstate commerce and three counts of possession of a stolen automobile which was in interstate commerce. Ward was also convicted on Count 1 which charged conspiracy to possess and transport stolen motor vehicles in interstate commerce, to commit mail fraud and to alter vehicle identification numbers. The trial judge sentenced Ward to five years imprisonment on the conspiracy count and to three years imprisonment on Count II, mail fraud, to run consecutively with the sentence imposed on the conspiracy count. The Court

further imposed five years imprisonment on each of Counts III - XIII to run concurrently with each other and concurrently with the sentences in Counts I and II. In addition to making restitution, the Defendant was ordered to pay a special assessment fee of $50.00 for each count, totalling $650.00.

On appeal, the Defendant raises three basic issues. First, the Defendant contends that the evidence was insufficient to show (1) that he knew the vehicles involved were stolen, (2) that one of the vehicles was taken without the true owner's consent or permission, and (3) that the vehicle identification numbers were altered or caused to be altered by the Defendant. Secondly, the Defendant asserts that

the possession of stolen vehicle counts are duplicitous of the transportation of stolen vehicles counts and therefore cannot stand. Finally, the Defendant contends that the trial court's denial of a motion for mistrial constitutes reversible error. Each of these points will be discussed after a review of the evidence adduced at trial.

David Ward testified at trial that he runs an Oklahoma business in which he purchases salvage vehicles from insurance pools and then rebuilds them for resale. The prosecution, however, painted quite a different picture of Ward's operation. Using the removed vehicle identification numbers from salvaged vehicles, Ward obtained similar stolen cars, changed the vehicle identification numbers to those

from the salvaged vehicles, and then misrepresented them as "rebuilt" when he sold them to used car dealers.

The allegedly stolen cars identified in the indictment included a Camaro, a Firebird, a Cadillac and a Cutlass. All of the cars except the Cutlass were positively identified by someone familiar with each vehicle. The Defendant was acquitted of all counts relating to the Cutlass automobile.

A convicted auto thief, Ralph Crowe, testified that Ward informed Crowe of what makes of cars Ward desired to obtain. Crowe then stole cars other than those identified in the indictment for Ward to purchase. Crowe further testified that the Defendant had given him a force tool used to

break the ignition switch on a Ford truck. Crowe explained to the jury how the Defendant operated the "salvage-switch" scheme.

The owners of the vehicles identified in the indictment listed characteristics peculiar to each of the vehicles, such as dents, flaws and difficult locks. These detailed characteristics were confirmed by observation after the cars were impounded in Fort Smith, Arkansas. In each case, the car had been stolen within two weeks of the date Ward had purchased a similar salvaged vehicle. The cars identified as stolen bore the vehicle identification numbers of Ward's salvaged and allegedly rebuilt vehicles which he had sold to a used car dealer who he knew operated a

dealership in Arkansas. As to each of the cars, the government presented expert evidence that the work Ward claimed to have done on the cars was never performed.

I. Sufficiency of Evidence Claims

The Defendant asserts that the evidence was insufficient to show beyond a reasonable doubt that he knew the vehicles were stolen. Contrary to his contention, the circumstantial evidence presented by the prosecution amply supports the jury's finding that Ward knew of the stolen character of the vehicles.

The factfinder is permitted to infer guilty knowledge when the Defendant is found in possession of recently stolen property and innocent possession is not satisfactorily

explained. **United States v. Burns**, 597 F.2d 939 (5th Cir. 1979). Ward asserted at trial that in his salvage and rebuilding business, possession of stolen parts to the car is an occupational hazard. However, "[a] defendant's explanation does not necessarily overcome the inference." **Id.** at 943 n.7.

In this case, the jury could properly find that Ward had not satisfactorily explained his possession of the stolen vehicles. Evidence which contradicts Ward's explanation of "innocent" possession includes the theft of each vehicle only after Ward had purchased a similar salvage car, Ward's sale of the stolen vehicles with the salvage vehicle identification numbers affixed, and the misrepresenta-

tions by Ward that the stolen vehicles had been rebuilt or substantially repainted. In the face of this contradictory evidence, the jury could properly reject as implausible Ward's explanation for his possession of recently stolen property. Therefore, the evidence was sufficient to find that Ward had knowledge that the vehicles were stolen.

Likewise, the evidence supports the jury's conclusion that the Defendant altered or caused to be altered the vehicle identification numbers of the stolen vehicles. The government is not required to produce an eye witness to the alteration of the vehicle identification numbers. Rather, "[c]ircumstantial evidence is entitled to the same weight as that

given to direct evidence in determining the sufficiency of the evidence to support a verdict of conviction beyond a reasonable doubt." **United States v. Thurston**, 771 F.2d 449, 452 (10th Cir. 1985) (citation omitted). Based upon the circumstantial evidence detailed above, a rational trier of fact could have found beyond a reasonable doubt that the Defendant altered or caused the vehicle identification numbers to be altered.

Finally, Ward argues that there was no evidence that the Camaro automobile was in his possession without the consent of the owner. While the true owner of the Camaro did not testify at trial, his brother who was familiar with the car did testify and identified the Camaro as belonging to

his brother. The owner's brother had spotted the automobile in Fort Smith, Arkansas, and immediately had notified his brother. Shortly thereafter, the owner filled out a stolen car police report which was admitted into evidence. The element of non-permissive possession may be established by circumstantial evidence. **United States v. Neapolitan**, 791 F.2d 489 (7th Cir. 1986), **cert.denied**, 107 S.Ct. 422 (1986). A jury could rationally infer that the filing of a stolen car report by the owner was inconsistent with and alien to permissive possession by Ward of the car.

II. Duplicitous Counts Claim

Ward contends that the three counts of charging illegal

transportation in interstate commerce of a stolen vehicle are duplicitous of the three counts charging illegal possession of a stolen vehicle in interstate commerce. Because the Defendant received a $50 special assessment fee on each count, we are precluded from using the concurrent sentence doctrine to avoid addressing this issue as was urged by the government. **Ray v. U.S.**, 107 S.Ct. 2093 (1987).

The Defendant concedes that the Supreme Court upheld a Sixth Circuit decision which rejected the contention that the two statutes, 18 U.S.C. §§2312 and 2313, are duplicitous. **Woody v. U.S.**, 359 U.S. 118 (1959) (per curiam) (**aff'g by an equally divided court** 258 F.2d 535 (6th Cir. 1957). As a

decision by an equally divided Supreme Court, the **Woody** decision is not entitled to precedential weight. **See, e.g., Neil v. Biggers**, 409 U.S. 188, 192 (1972). Nevertheless, the Tenth Circuit has consistently held that §§ 2312 and 2313 are not duplicitous. **See Lindsay v. United States**, 134 F.2d 960, 961-62 (10th Cir.), **cert. denied**, 319 U.S. 763 (1943); **Jackson v. Hudspeth**, 111 F.2d 128, 129 (10th Cir. 1940); **Chrysler v. Zerbst**, 81 F.2d 975, 976 (10th Cir. 1936). We are persuaded that this position is correct.

III. Denial of Mistrial Motion

Ward moved for a mistrial during the prosecution's direct examination of witness Ralph Crowe. The motion immediately ensued from the following exchange:

Q. Did you ever discuss with David Ward the business of Jerry Grist?

A. We talked a little bit about it. When I first starting dealing with David I didn't know he really had a lot to do with Grist.

Q. How did you find out to the contrary?

A. Well, through dealing with all three of the men, I found out that they were paying the Sheriff off, and ---

Transcript at 170, lines 6-13.

The Defendant objected that the remark was unrelated to the charged crimes, purposely solicited, irrelevant and highly prejudicial. At the bench conference, the trial court found the answer to be inadvertent and that the government had not suggested the response by its questioning.

The trial judge immediately understood the prejudicial import of the reference to bribing county

officials. After the judge determined that the fleeting prejudicial comment could be cured, the judge sought advise from counsel as to how the curative instruction should be framed. The Court admonished the jury as follows:

> Ladies and gentlemen, this last answer that this witness gave, I admonish you not to consider that in making a decision in this case. This defendant certainly isn't charged with anything like what this witness said, and there's no reason he should have to defend against that. Just because this witness made a statement like that here in the middle of the trial doesn't mean that he has to defend against that. Just don't consider his answer. It was uncalled for, wasn't asked for by counsel, something he has volunteered, may or may not be true, but it wouldn't make any difference. So just don't consider it in deciding this case. It's just absolutely irrelevant, and you shouldn't consider it.
>
> Transcript at 174-75.

It is Ward's contention that no instruction could have erased the

statement from the minds of the jury, and that he was therefore deprived of a fair trial.

We initially note that this is not a case in which the trial court admitted the evidence relating to an uncharged crime. There is no question that the trial court's determination that the jury should not consider the inflammatory statement was a proper exercise of discretion, whether the evidence was irrelevant or, as now argued by the government, minimally relevant to prove absence of mistake. **See United States v. Van Cleve**, 599 F.2d 954 (10th Cir. 1979).

Our inquiry must focus on whether the harmful effects of the prejudicial statement deprived the Defendant of a fair trial. The trial judge determined

that an immediate curative instruction would sufficiently negate any prejudice to the Defendant from the fleeting, unsolicited testimony. "Whether a motion for mistrial should be granted is within the discretion of the trial judge because he is in the best position to evaluate the effect of the offending evidence on the jury." **United States v. Laymon**, 621 F.2d 1051, 1053 (10th Cir. 1980). When a jury has heard evidence of prior misconduct, denial of a mistrial motion is most likely to be upheld when, as here, "the evidence is excluded, the jury is instructed to disregard it, and the reference is both vague and passing in nature." **United States v. Taylor**, 605 F.2d 1177, 1179 (10th Cir. 1979).

We cannot say that the trial court abused its discretion when it denied the motion for mistrial. In determining prejudicial error, the Court looks not only to the three factors outlined in **Taylor**, but to the probable effect of the improper testimony on the average juror. **Chase v. Crisp**, 523 F.2d 595 (10th Cir. 1975), **cert. denied**, 424 U.S. 947 (1976). Where the strength of the government's case leaves no reasonable doubt that the jury would have reached the same verdict in the absence of the improper testimony the prejudicial effect of the testimony may be characterized as harmless. **Id.** at 598. Moreover, the acquittal of the Defendant on the three charges involving the Cutlass automobile belies

the Defendant's contention that the jury was incapable of disregarding Crowe's volunteered reference to the Sheriff.

In conclusion, we hold that the convictions were supported by strong evidence of guilt, that improper testimony as to prior misconduct was properly excluded by the trial court, and that the curative instruction given by the Court negated any prejudicial impact on the verdict. Ward received due process and a fair trial.

AFFIRMED.

Entered for the Court
John E. Conway
U.S. District Judge

EASTERN DISTRICT OF OKLAHOMA

FILED
December 17, 1986
Lewis L. Vaughn
Clerk, U.S. District Court
By: _____
Deputy Clerk

Docket No. 86-79-CR

DEFENDANT: David Joe Ward

JUDGMENT AND PkOBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date December 17, 1986.

COUNSEL: WITH COUNSEL - Duane Miller

FINDING AND JUDGMENT: There being a verdict of GUILTY, as to Cts., 1 through 13. Defendant has been convicted as charged of the offenses of: From on or about January 1, 1984 up to and including the date of indictment in the Eastern District of Oklahoma, the defendant did: Conspire with others to possess and transport stolen

motor vehicles interstate commerce; devise a scheme to defraud; Alter vehicle identification numbers on motor vehicles; dispose of stolen motor vehicles moved interstate commerce, all in violation of Title 18, United States Code, Sections 371, 1341 & 2, 2312 & 2. SENTENCE OR PROBATION ORDER - SPECIAL CONDITIONS OF PROBATION: The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5)

Years on Count 1. It is adjudged that on Count 2 the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of Three (3) Years. Said sentence on Count 2 is to run consecutively to the sentence on Count 1. It is adjudged that on Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13, that the defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment on each count for a term of Five (5) Years. Said sentence on each count is to run concurrently with each other and concurrently with the sentence on Counts 1 & 2. It is further ordered pursuant to the provisions of 18 U.S.C. § 3579, that the defendant make

restitution to Robin Chism, 13523 East 40th St., Tulsa, OK, in the amount of $50.00 and to Mr. Bob Stiles, 4919 South Columbia Avenue, Tulsa, Oklahoma, in the amount of $250.00. Said payments are to be made through the office of the United States Attorney Eastern District of Oklahoma.

It is further ordered that you pay a $50.00 special assessment in each Count 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13, for a total of $650.00 to be paid prior to release from confinement and to be paid through the office of the United States Attorney Eastern District of Oklahoma.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is

hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The Court orders commitment to the custody of the Attorney General and recommends,

Signed by: FRANK H. SEAY, U.S. District Judge

Date: December 17, 1986

Certified as a true copy on this date: 12-17-86, by Teresa Loyd, Deputy.

(2)

Supreme Court, U.S.
FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1912

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID JOE WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

1308

QUESTIONS PRESENTED

1. Whether a defendant may be separately convicted and sentenced under 18 U.S.C. 2312 for transporting a stolen vehicle in interstate commerce and under 18 U.S.C. (Supp. IV) 2313 for possessing, concealing, selling or disposing of the same stolen vehicle after it crossed a state line.

2. Whether the district court should have declared a mistrial because of a comment made by a government witness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1912

DAVID JOE WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1988. The petition for a writ of certiorari was filed on May 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of altering motor vehicle identification numbers, in violation of 18 U.S.C. (Supp. IV) 511; three counts of transporting a stolen automobile in

interstate commerce, in violation of 18 U.S.C. 2312; and three counts of possessing, concealing, selling, or disposing of stolen automobiles, in violation of 18 U.S.C. (Supp. IV) 2313. He was also convicted of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to concurrent five-year terms of imprisonment on each count except one of the mail fraud counts. On that count, he was sentenced to three years' imprisonment, to run consecutively to the other sentences. For each of petitioner's 13 convictions, the district court also imposed a $50 special assessment pursuant to 18 U.S.C. (Supp. IV) 3013. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A4-A7). It showed that petitioner engaged in a fraudulent scheme that involved disguising and reselling stolen cars. The scheme worked as follows: petitioner purchased salvage vehicles from insurance pools; he removed the vehicle registration numbers from the vehicles; he then obtained stolen cars of similar types; he changed the vehicle identification numbers on the stolen cars to those from the salvaged vehicles; and he then sold the stolen cars to used-car dealers, representing them as "rebuilt" (*id.* at A4-A5). As to each of the three cars on which petitioners' convictions were based, the work petitioner claimed to have done on the car was never performed (*id.* at A7). In connection with his scheme, petitioner would inform Ralph William Crow, a convicted car thief, of the makes of cars petitioner wished to obtain, and Crow would steal the cars (*id.* at A5).

Petitioner sold or consigned each of the three stolen cars involved in this case to Pat Hickey, who transported them from Oklahoma to Fort Smith, Arkansas (Tr. 207, 217, 220, 222). After a time, Hickey sold two of the cars (Tr.

209-218); the third was recovered by its owner while it was at a detail shop being prepared for sale (Tr. 52-58, 220-222).

2. On appeal petitioner contended that he could not be separately convicted and sentenced for transporting a stolen vehicle in interstate commerce and for possessing, concealing, selling, or disposing of the same vehicle after it crossed a state line. The court of appeals rejected that claim, relying on previous Tenth Circuit authority (Pet. App. A13).[1] Petitioner also contended that the district court should have declared a mistrial when Crow testified during direct examination by the government that petitioner was "paying the Sheriff off." The court of appeals held that a mistrial was not necessary in light of the curative instruction given by the district court and in light of the strength of the government's case (*id.* at A18-A19).

ARGUMENT

1. Section 2312 makes it a crime to transport a vehicle in interstate commerce knowing it to be stolen. Section 2313 makes it a crime to receive, possess, conceal, store, barter, sell, or dispose of a vehicle that has crossed a state line after being stolen, knowing it to be stolen. The Section 2312 counts in the indictment charged petitioner with aiding and abetting Hickey in transporting the stolen vehicles from Oklahoma to Arkansas. The Section 2313 counts charged petitioner with aiding and abetting Hickey in possessing, concealing, selling, or disposing of the cars. Petitioner contends (Pet. 9-12) that he could not be

---

[1] See *Lindsay* v. *United States*, 134 F.2d 960, 961-962 (10th Cir.), cert. denied, 319 U.S. 763 (1943); *Jackson* v. *Hudspeth*, 111 F.2d 128, 129 (10th Cir. 1940); *Chrysler* v. *Zerbst*, 81 F.2d 975, 976 (10th Cir. 1936).

separately convicted and sentenced under Sections 2312 and 2313.[2]

The issue that petitioner raises has been frequently litigated in the courts of appeals, and an unbroken line of decisions spanning more than 60 years has rejected petitioner's position. See *United States* v. *Spudic*, 795 F.2d 1334, 1340-1342 (7th Cir. 1986); *United States* v. *Sanders*, 538 F.2d 695 (5th Cir.), cert. denied, 429 U.S. 985 (1976); *United States* v. *Neighbors*, 515 F.2d 796, 797 (8th Cir. 1975); *United States* v. *Marvel*, 493 F.2d 15 (5th Cir. 1974); *United States* v. *Ploof*, 464 F.2d 116, 120 (2d Cir.), cert. denied, 409 U.S. 952 (1972); *United States* v. *Thompson*, 442 F.2d 1333 (6th Cir. 1971); *United States* v. *Stone*, 411 F.2d 597, 599 (5th Cir. 1969); *Strother* v. *United States*, 387 F.2d 385 (5th Cir. 1967), cert. denied, 391 U.S. 971 (1968); *United States* v. *Linkenauger*, 357 F.2d 925 (6th Cir. 1966); *United States* v. *Lankford*, 296 F.2d 34, 36 (4th Cir. 1961); *Woody* v. *United States*, 258 F.2d 535 (6th Cir. 1957), aff'd by an equally divided Court, 359 U.S. 118 (1959); *Austin* v. *United States*, 224 F.2d 273 (6th Cir.), cert. denied, 350 U.S. 865 (1955); *Madsen* v. *United States*, 165 F.2d 507 (10th Cir. 1947); *Spradley* v. *United States*, 162 F.2d 203 (6th Cir. 1947); *Pifer* v. *United States*, 158 F.2d 867 (4th Cir. 1946), cert. denied, 329 U.S. 815 (1947); *Batson* v. *Squier*, 146 F.2d 264 (9th Cir. 1944);

---

[2] Although petitioners' prison terms for each Section 2312 conviction and each Section 2313 conviction are concurrent, the district court's imposition of a $50 special assessment on each count precludes application of the concurrent sentence doctrine. *Ray* v. *United States*, No. 86-281 (May 18, 1987). Even if petitioner were successful in his claim that he may not be convicted on both the Section 2312 counts and the Section 2313 counts, however, his eight-year term of imprisonment would not be affected; the only effect of a ruling in his favor on that point would be to reduce by $150 the total amount of the special assessment he must pay under 18 U.S.C. (Supp. IV) 3013.

Lindsay v. *United States, supra*; *Record* v. *Hudspeth*, 126 F.2d 215 (10th Cir.), cert. denied, 316 U.S. 703 (1942); *Jackson* v. *Hudspeth, supra*; *Doll* v. *Johnston*, 95 F.2d 838 (9th Cir.), cert. denied, 304 U.S. 574 (1938); *Chrysler* v. *Zerbst, supra*; *York* v. *United States*, 299 F. 778 (6th Cir. 1924); see also *United States* v. *Wolf*, 813 F.2d 970, 978 (9th Cir. 1987).

The legality of separate punishment for multiple offenses turns on congressional intent. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 861 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 365-368 (1983). The court below correctly determined that Congress intended to authorize separate punishments for violations of Sections 2312 and 2313.

If two offenses are charged in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize separate punishment. See *Albernaz* v. *United States*, 450 U.S. 333, 336 (1981); *United States* v. *Marrale*, 695 F.2d 658, 662 (2d Cir. 1982), cert. denied, 460 U.S. 1041 (1983). Here, Sections 2312 and 2313 are separate statutes, and each contains a separate penalty provision.

The usual standard for determining if the legislature intended to authorize separate punishment under two statutes is "whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). One can of course "conceal," "store," "barter," "sell," or "dispose of" a stolen vehicle that has crossed a state line without having participated in the interstate transportation; conversely, one can transport a stolen vehicle in interstate commerce without concealing, storing, bartering, selling, or disposing of it once it has crossed a state line. And typically a person transporting a vehicle in interstate commerce will already

have received it by the time he crosses a state line; accordingly, receipt under Section 2313 is not implicit in transportation under Section 2312. The converse is also true: one can receive a stolen vehicle that has crossed a state line without having participated in any way in its transportation.

Of the various acts prohibited by Section 2313, only "possession" is ordinarily involved in the transportation itself; a person who transports a stolen vehicle across a state line often possesses the vehicle in the destination state. It is possible, however, to cause the interstate transportation of a vehicle without having either actual or constructive possession of the vehicle in the destination state—for example, a person may induce a third party to transport the vehicle but may lose dominion and control over the vehicle when the third party takes possession of it. Therefore, even in the case of possession, the *Blockburger* test is satisfied: a person can possess a stolen vehicle without transporting it or causing its transportation, and a person can cause the transportation of a stolen vehicle without possessing it in the destination state.

Even apart from the *Blockburger* test, the offenses of possession and transportation are separate, at least in circumstances such as those in this case. Even if one possesses a stolen vehicle throughout its interstate transportation, one can continue to possess the vehicle in violation of Section 2313 after its movement in interstate commerce has come to a halt and the Section 2312 offense is complete. And it has been held that possession under Section 2313 is a separate offense from transportation under Section 2312 when the possession extends "beyond the time necessary to complete the offense of transporting the [vehicle] in [interstate] commerce." *United States* v. *Wolf*, 813 F.2d at 978. That was precisely the case here. After the cars reached their destination in Fort Smith, Arkansas, they remained in Hickey's possession for a

period of time as he had them prepared for sale and tried to sell them (Tr. 209-222). Because Hickey and petitioner were accomplices, Hickey's possession was attributable to petitioner.

Finally, the two statutes serve different objectives. Section 2312 is directed solely against those who transport stolen vehicles in interstate commerce. Section 2313, on the other hand, is directed at acts—such as concealing, bartering, storing, and selling—that are separate from and in addition to interstate transportation, and that normally would require a criminal impulse different from the act of transporting. That distinction between the objectives of the two statutes was sharpened by the amendment of Section 2313 in 1984.[3] Previously, the statute required that the prohibited acts be committed while the vehicle was moving in interstate commerce.[4] See, *e.g.*, *United States* v. *Thomas*, 676 F.2d 239, 242 (7th Cir. 1980), cert. denied, 449 U.S. 1091 (1981); *United States* v. *Hiscott*, 586 F.2d 1271, 1274 (8th Cir. 1978); *United States* v. *Hall*, 455 F.2d 492, 493 (5th Cir.), cert. denied, 406 U.S. 927 (1972). Now, as a result of the amendment, the statute reaches conduct committed any time after the car has crossed a state line, even if it has come to a stop and is no longer in the stream of interstate commerce. Accordingly, under the old statute violations of Sections 2312 and 2313 would always occur simultaneously; under the amended statute, that need not necessarily be the case.

This Court previously considered the issue whether separate sentences may be imposed for violations of

---

[3] It is the amended version of the statute that applies to this case. Each substantive offense alleged in the indictment occurred in 1985.

[4] The statute formerly made it a crime to commit the specified acts with respect to a car "moving as, or which is a part of, or which constitutes interstate * * * commerce" (18 U.S.C. 2313).

Sections 2312 and 2313 in *Woody* v. *United States*, 359 U.S. 118 (1959). There, the court of appeals decision upholding separate sentences was affirmed by an equally divided Court. There is, however, no need for the Court to revisit the issue here in light of the unanimity of the court of appeals decisions in this area both before and after *Woody*, and in light of the 1984 amendment of Section 2313.

2. Ralph Crow testified for the government at trial. During his direct examination, the following exchange took place (Pet. App. A14):

> Q. Did you ever discuss with David Ward the business of Jerry Grist?
>
> A. We talked a little bit about it. When I first starting dealing with David I didn't know he really had a lot to do with Grist.
>
> Q. How did you find out to the contrary?
>
> A. Well, through dealing with all three of the men, I found out that they were paying the Sheriff off, and—

Petitioner immediately moved for a mistrial, and the district court denied the motion. Petitioner contends (Pet. 13-25) that that ruling was error.

It is well settled that the question whether a mistrial should be granted is within the sound discretion of the district court. Here, the court of appeals correctly concluded (Pet. App. A18-A19) that it was not an abuse of discretion for the district court to deny the motion for a mistrial.

First, the district court promptly gave a curative instruction in which it told the jurors that Crow's statement was "absolutely irrelevant" and that they should not consider it in deciding the case (Pet. App. A15). It is normally presumed that a jury will follow an instruction to

disregard inadmissible evidence. *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9 n.8; *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6-7, 10. Second, as the court of appeals held (Pet. App. A18), the government's case was sufficiently strong that there could be "no reasonable doubt that the jury would have reached the same verdict in the absence of the improper testimony." Finally, this is not a case in which the improper testimony was deliberately elicited by the government; Crow's comment was unresponsive to the prosecutor's question, as the district court explicitly found (*id.* at A14, A15). In these circumstances, there was no need for a mistrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JULY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60551